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No. 99-816

In the
SUPREME COURT OF THE UNITED STATES

JUDITH M. KOENICK, *Petitioner*,

v.

REGINALD M. FELTON, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

1. Petitioner has standing

The Court of Appeals held that petitioner has standing because, as a taxpayer, she bears part of the burden of funding a paid public school holiday around Easter. Pet. 8a. It reasoned that the allegedly improper expenditure of public funds constitutes an injury to municipal taxpayers. *Id.* 7a-8a.

Respondents reject this, alleging that "nothing in the record" supports the Fourth Circuit's observation that Maryland's public school calendar statute establishes a paid holiday on the Friday before Easter. Opp. 13. In essence, they maintain that the schools are open and teachers are paid for the same number of days regardless of the designation of any particular holidays. This argument is incorrect because it overlooks respondents' twelve-month employees, such as the board's central administrative staff. These employees receive a paid holiday on Good Friday that they would not receive but for Md. Code Ann., Educ. § 7-103(c) (1999) (hereinafter § 7-103).

"The number of days at work for a twelve-month unit member shall be determined by subtracting Saturdays, Sundays, *holidays*, and annual leave from the total days in the year." J.A. 41 (MCPS Collective Bargaining Agreement) (emphasis added). As a result, twelve-month employees work two fewer days because of the Good Friday and Easter Monday holidays. Thus, as a direct consequence of § 7-103, petitioner's tax dollars support paid Good Friday and Easter Monday holidays for respondents' twelve-month employees.

2. Section 7-103 closes Maryland's public schools for a religious holy day

Contrary to respondents' suggestion, the petition correctly and fairly states the issue presented to and decided by the Court of Appeals. Section 7-103 mandates that all public schools close from the "Friday before Easter and from then through the Monday after Easter." The statute, on its face, requires public schools to close on Good Friday, which is universally understood to be the "Friday before Easter, a holy day of the Christian church, observed as commemorative of Christ's crucifixion." NEW WEBSTER'S DICTIONARY OF THE ENGLISH LANGUAGE 656 (1981). Respondents also ignore the Montgomery County Public Schools' own explicit references to the "Good Friday" holiday in documents predating this litigation. *See, e.g.*, J.A. 65, 66 (MCPS School Calendar Announcements). Other Maryland school systems' official calendars have similarly referred *in haec verba* to the "Good Friday" holiday. *See, e.g.*, J.A. 174-78. These references merely recognize the obvious: "the Friday before Easter" and "Good Friday" are one and the same.

Describing Good Friday without employing the words "Good Friday" cannot insulate § 7-103 from Establishment Clause challenge. Would it make a difference constitutionally if, instead of requiring that the King James Bible be read at public school assemblies, respondents required that principals "read selected passages from a book that was originally written in Greek and was translated into English by a committee of scholars in 1611"?

When it enacted § 7-103, the Maryland General Assembly obviously knew that the Friday before Easter is the Christian holy day known as Good Friday. This case is about Good Friday. To argue otherwise "is to appeal to unreality." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 18 (1941) (Frankfurter, J., dissenting).

Even if § 7-103 were properly characterized as an "Easter" holiday statute, the Establishment Clause analysis would remain the same because Easter is a religious holiday. While the District Court concluded that Easter is a "highly secularized 'holiday,'" Pet. 25a, the Court of Appeals correctly dismissed that characterization as unsupported "in the record or otherwise." *Id.* 5a n.7. Quite the reverse, the record demonstrates that more than two-thirds of adult Americans attend church on Easter, a far higher percentage than on a typical Sunday or on Christmas Eve and Christmas Day combined. J.A. 296-97. This surge in church attendance demonstrates that, unlike Christmas and Thanksgiving, Easter remains a predominantly religious event. While Easter "may be accompanied by certain 'secular aspects' such as Easter bunnies and Easter egg hunts," it "is nevertheless a religious holiday." *County of Allegheny v. ACLU*, 492 U.S. 573, 633 (1980) (O'Connor, J., concurring).

Respondents find it telling that § 7-103 establishes not only Good Friday, but also Easter Monday as a public school holiday in Maryland. Opp. 4. But Maryland holiday law makes clear that the Easter Monday holiday is an extension of Easter. Specifically, the Maryland Code provides that if a holiday falls on a Sunday, it will be observed "on the next Monday after that date." MD. ANN. CODE art. 1, § 27(b) (1998). Unlike Christmas and Thanksgiving, Easter never falls on a weekday. Thus, it was

unnecessary for the legislature to name Easter as a public school holiday to accommodate religious observance, and an informed observer would conclude that the Easter Monday holiday constitutes the public schools' observance of Easter.[1] And indeed, consistent with this, the official Montgomery County school calendar identifies the Good Friday and Easter Monday school closures as the "Easter" holiday. J.A. 150. Far from refuting petitioner's claim that § 7-103 is unconstitutional, therefore, the statute's creation of an Easter Monday holiday (a legislative approach shared only with the Virgin Islands) is an integral part of the Establishment Clause violation.

3. The lower courts are plainly divided over the permissibility of establishing religious holy days as public holidays

The petition cites six federal and state cases that invalidate laws or practices according Good Friday special status and seven federal and state cases (including this one) that uphold such laws or practices. Pet. 15-18. Respondents are therefore mistaken when they accuse petitioner of "rel[ying] on a single decision from the Seventh

[1] Parliament made Easter Monday a legal holiday under Edward VI. Keeping of Holy Days and Fasting Days Act, 1551-52, 5 & 6 Edw. 6, ch. 3, § 1 (Eng.). It was a day of obligatory rest and worship. The law required that individuals abstain from labor and that they "proceed to their parish church or chapel . . . and there to abide orderly and soberly during the time of the common prayer preaching or other service of God." Act of Uniformity, 1551-52, 5 & 6 Edw. 6, ch. 1, § 1 (Eng.). The act of Edward VI was not repealed until 1969. The Statute Law (Repeals) Act, 1969, ch. 52 (Eng.).

Circuit and baldly proclaim[ing] that there is a great conflict among the circuits that warrants granting certiorari in this case." Opp. 3-4 (citation omitted).

Respondents are similarly mistaken in suggesting that the decision below can be reconciled with Chief Judge Posner's analysis in *Metzl v. Leininger*, 57 F.3d 618 (7th Cir. 1995). Opp. 5-6. In addition to differing over outcome, the two cases diverge in their reasoning, most starkly over the allocation of the burden of proof. *Metzl* correctly imposes on the state the duty to prove a secular justification for a Good Friday holiday statute. *Id.* at 622. The Fourth Circuit, in sharp contrast, could do no better than rely on assumptions about absenteeism (without reference to any empirical basis),[2] Pet. 14a, thus effectively shifting the burden to the petitioner. Disparate views on questions as fundamental as who has the burden of proof and how it can be met clearly warrant resolution by this Court.

4. Section 7-103 violates the Establishment Clause

Strict scrutiny is the appropriate standard for assessing § 7-103's constitutionality. Certiorari should be granted to determine whether *Larson v. Valente*, 456 U.S. 228 (1982), includes a previously-unarticulated exception for religious holiday statutes. However, even under *Lemon v. Kurtzman*, 403 U.S. 602 (1971), § 7-103 is unconstitutional. While § 7-103 fails each of *Lemon*'s three prongs, Pet. 20-21,

[2] The Court of Appeals' notion that "people expect to have these days off and have planned accordingly," Pet. 14a, is not a substitute for empirical evidence. On the contrary, this element of the decision below is transparently circular.

this discussion is limited to refuting respondents' arguments regarding the purpose prong. *See also id.* 21-22.

Respondents maintain that § 7-103 serves two basic purposes: (1) avoiding absenteeism and the inefficiencies it creates, and (2) promoting uniformity in the school calendar. Opp. 10-11. However, they offer no empirical evidence—such as survey results or attendance data from demographically-comparable school systems that *do* hold class on Good Friday—that student or faculty absenteeism would be unacceptably high if classes were held in Montgomery County. Nor have respondents ever articulated or applied to Good Friday or Easter Monday a religiously-neutral holiday attendance break point below which holding classes is not productive or efficient. Pet. 18-19; *see also id.* 14-15.

The record also explodes respondents' claim that § 7-103 serves the interest of school calendar uniformity. Maryland public school system calendars vary widely: *no two are alike*. *See* J.A. 173. Section 7-103 directly leads to such divergent calendars by giving local school boards considerable discretion in scheduling classes, so long as school is held on at least 180 days over a ten-month period. Nor would a desire in principle for calendar uniformity explain why Good Friday was selected as one of the "uniform" holidays. The legislature could just as easily have required a spring break in the first week of April. In fact, Easter's shifting time (as a "movable feast") renders it singularly unsuited to serve as the anchor for scheduling a "uniform" spring break. The Western churches celebrate Easter as early as March 22 and as late as April 25. 4 ENCYCLOPEDIA OF RELIGION 557 (Mircea Eliade ed. 1987). Thus, a spring break that pivots around Easter will vary

substantially from year to year. Calendar uniformity, therefore, does not provide a secular justification for closing schools on Good Friday.

There being no other explanation, § 7-103 is exactly what it seems to be: an endorsement of the Christian faith.

CONCLUSION

For the foregoing reasons and those previously stated, the petition should be granted.

Respectfully submitted,

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